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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 322

JOHN COLBERT, CALVIN E. HERBERT and ROBERT WALDEN,

Petitioners,

PEERLESS CHEMICALS (P.R.) INC., and PEERLESS OIL & CHEMICAL CORP.,

Respondents.

BRIEF AND APPENDIX OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
THE OPINIONS OF THE COURT BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2
ARGUMENT:	
1. No error justifying interference by this Court was committed by the Court of Appeals in applying the jurisdictional tests laid down in the federal authorities, nor was there any error in its determination that, viewed in the light of these tests, the activities of Peerless Chemicals (P.R.) Inc. within the State of New York were insufficient to subject it to the jurisdiction of the District Court in either the Southern or the Eastern District of New York	4
2. No special or important reasons exist in this case for granting a writ of certiorari, nor is there any basis for the exercise of this Court's power of supervision	6
CONCLUSION	7
APPENDIX:	
Deposition of Dennis Carey	1b

Table of Cases Cited

	PAGE
Belgian Mission v. Zarati Steampship Co., 90 F. Supp. 741	4
Bordas v. Pizarro Serrano, 314 F. 2d 291, 292	6
Goldlawr, Inc. v. Heiman, 369 U. S. 463	3
Kilpatrick v. Texas & P. R. Co., 166 F. 2d 788, cert. denied 335 U. S. 814	4
Long v. Victor Products Corporation, 297 F. 2d 577	5
McGee v. International Life Insurance Co., 355 U. S. 220	5
Perkins v. Benguet Consolidated Mining Company, 342 U. S. 437, 448	6
Robertson v. Railroad Labor Board, 268 U. S. 619, 627	4
United States v. Scophony Corporation, 333 U. S. 795, 819	5

Statutes Cited

Title 28 U. S. C., Section 1332	1
Title 28 U. S. C., Section 1391 (c)	4

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The Opinions of the Courts Below

The petition contains the citations of the opinions below. They are printed at pages A5 to A28 of the petition.

Jurisdiction

The petitioners are citizens and residents of the State of Maryland. The respondent Peerless Chemicals (P.R.) Inc. is a citizen and resident of Puerto Rico. The respondent Peerless Oil & Chemical Corp. is a citizen and resident of the State of New York. Jurisdiction is based on diversity of citizenship, 28 U. S. C. § 1332.

Questions Presented

1. Is the respondent Peerless Chemicals (P.R.) Inc. amenable to service of process in the State of New York?

Statement

The plaintiffs, employed as longshoremen, were injured by escaping chlorine gas while unloading a ship at a dock in Baltimore. They claimed that one of the proximate causes of their accident and injuries was the negligence of the respondents.

Suit was first filed in the Southern District of New York and service made on Dennis Carey, a resident in the Eastern District of New York, who was president of both respondent corporations. The respondent, Peerless Oil & Chemical Corp., a New York corporation, appeared and answered. The respondent, Peerless Chemicals (P.R.) Inc., appeared specially and moved to vacate the service and dismiss the complaint on the ground that it was not amenable to service of process in the State of New York, because it was neither a citizen nor resident of that State nor was it doing sufficient business within the State to warrant the inference that it was present there. District Judge Lloyd F. MacMahon vacated the service and dismissed the complaint (Petition, A6).

Suit was then filed in the Eastern District of New York and the same procedural steps were taken by each respondent. Peerless (P.R.) appeared specially and moved to vacate the service and dismiss the complaint on the same grounds as urged in the Southern District. The petitioners took the deposition of Dennis Carey and through oral testimony and documentary exhibits developed fully all of the facts relating to any business contacts the respondent Peerless (P.R.) had with the State of New York. In an opinion which fully and carefully analyzed all of the testimony, Judge Dooling found Peerless (P.R.) could not properly be

served in the State of New York, and that jurisdiction *in personam* of Peerless (P.R.) had not been obtained.

In view of this Court's decision in *Goldlawr, Inc.* v. *Heiman*, 369 U. S. 463, Judge Dooling granted the petitioners time within which to make an appropriate motion to change the venue to a district where *in personam* jurisdiction could be obtained (Petition, A14). Petitioners appealed from both orders.

The Court of Appeals unanimously affirmed. The grounds for the affirmance are set forth in the learned and exhaustive opinion of Circuit Judge Kaufman, writing for the Court, in which he analyzes at length the standards set up by the federal decisions for determining whether a corporation is amenable to the service of process in a foreign jurisdiction, the several tests which, either together or in the alternative, have been applied by the federal courts in determining that issue, and the nature and content of the contacts with the foreign jurisdiction which make it "reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought" in the foreign jurisdiction. The Court unanimously concluded that, subjected to the tests set up in the controlling federal authorities, the activities of Peerless (P.R.) did not constitute such minimal contacts with the State of New York as to render it subject to service of process in that State.

It should be emphasized that neither Judge Dooling nor the Court of Appeals, in deciding that Peerless (P.R.) was not amenable to service in New York, applied any test other than the tests laid down in the federal authorities. That there is any significant difference between the tests applied by the State of New York and those applied under federal procedure is debatable, but that problem does not affect this case because the Court applied the federal tests which are assumed to be less advantageous to the foreign corporation than are the New York tests (Petition, A 18).

ARGUMENT

1. No error justifying interference by this Court was committed by the Court of Appeals in applying the jurisdictional tests laid down in the federal authorities, nor was there any error in its determination that, viewed in the light of these tests, the activities of Peerless Chemicals (P.R.) Inc. within the State of New York were insufficient to subject it to the jurisdiction of the District Court in either the Southern or the Eastern District of New York.

28 U. S. C. Section 1391 (c) provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business; and such judicial district shall be regarded as the residence of such corporation for venue purposes."

It has long been established that, except in certain limited instances where the area of jurisdiction has been extended by statute, "the jurisdiction of a district court *in personam* has been limited to the district of which the defendant is an inhabitant, or in which he can be found." (*Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 627.) And this is true whether the action is brought on federal statute (*Kilpatrick* v. *Texas & P. R. Co.*, 166 F. 2d 788, cert. denied 333 U. S. 814), or is in admiralty (*Belgian Mission* v. *Zarati Steamship Co.*, 90 F. Supp. 741). A corporation must be "present", that is doing business, within the district in order to subject it to suit in the district.

The nature and extent of the activities of the corporation which constitute "presence" or "doing business" have been formulated generally by the Supreme Court. The test seems to be whether the corporation has certain minimum contacts with the State of the forum so

that maintenance of the suit there would not offend traditional notions of fair play and substantial justice. (*McGee v. International Life Insurance Co.*, 355 U. S. 220.)

In applying the tests, reference must be had to the facts in each case, and each case must stand on its own facts. (*Long v. Victor Products Corporation*, 297 F. 2d 577 (1961).) In that connection, Mr. Justice Frankfurter in his concurring opinion in *United States v. Scophony Corporation* (333 U. S. 795, 819) said:

> "Whether a corporation 'transacts business' in a particular district is a question of fact in its ordinary untechnical meaning. The answer turns on an appraisal of the unique circumstances of a particular situation. And a corporation can be 'found' anywhere, whenever the needs of law make it appropriate to attribute location to a corporation, only if activities on its behalf that are more than episodic are carried on by its agents in a particular place. This again presents a question of fact turning on the unique circumstances of a particular situation, to be ascertained as such questions of fact are every day decided by judges."

In the instant case, no one can contend that Judge Dooling in the district court did not carefully appraise the factual situation and sift it for possible evidence that Peerless (P.R.) was engaged in activities of a character to warrant subjection to the local jurisdiction. He found no evidence of such activity. The Court of Appeals reviewed and affirmed his findings. Its opinion clearly shows that the legal significance of the activities of Peerless (P.R.) in New York State was evaluated, from the point of view of jurisdictional requirements, by application of all of the tests and criteria laid down by the controlling federal authorities. It is certainly not a function of the United States Supreme Court to review further that decision.

The petitioners seek to draw a distinction between diversity cases such as the instant case, where legal concepts developed in the general maritime law may be applicable, and diversity cases where state law alone is applicable. No such distinction has been made in any of the authorities. A state may, as a matter of state policy, establish for its own courts tests more advantageous to the foreign corporation and decline jurisdiction; or it may seek to establish tests less advantageous to the foreign corporation than those laid down by the federal courts. This is a matter of state policy and is subject only to the requirement that the tests established do not violate constitutional due process. (*Perkins v. Benguet Consolidated Mining Company*, 342 U. S. 437, 448.) Whether state or federal tests should apply in diversity cases is an open question. But that question does not arise here since the tests applied were those established under federal law and the court expressly disclaimed any intent to decide whether state or federal procedural tests should be applied in all diversity cases.

There is nothing in the record to sustain the petitioners' contention that they are being deprived of a jury trial; or that a jury trial in Puerto Rico will be less a jury trial than a jury trial in New York. All proceedings are conducted in English and the suggestion that the petitioners will be deprived of a fair jury trial in the courts in Puerto Rico is entirely groundless. (*Bordas v. Pizarro Serrano*, 314 F. 2d 291, 292.) The contention that the petitioners are being deprived of due process under the Fifth Amendment by the decision in this case is obviously without foundation.

2. No special or important reasons exist in this case for granting a writ of certiorari, nor is there any basis for the exercise of this Court's power of supervision.

The main question which the petitioners request this Court to review is a question which did not arise in the case. In determining if a foreign corporation is "present"

in the local jurisdiction, in the sense that it is amenable to service of process there, whether a federal test or a state test should be applied is a question that is being considered in several Circuits. It was not, however, a question that had to be decided in this case because the Court found that under either test Peerless (P.R.) could not be found to have such minimal contacts with New York State as to subject it to service of process in New York. There was no attempt on the part of either the District Court or of the Court of Appeals to subject federal procedure to the requirements of New York State law. That question was not raised, was not passed upon, and was not presented for review.

The only other question that would remain is whether the courts below, in applying a proper test to the particular facts in this case, have reached a conclusion with which the United States Supreme Court might conceivably not agree. That scarcely presents a proper case for the granting of certiorari.

CONCLUSION

For the reasons stated, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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